INDEX

	Page
Statement	2
Specification of errors to be urged	4
Reasons for granting the writ	5

CITATIONS

Cases:	
McCaughn, Collector, v. Philadelphia Barge Co., 27 F. (2d) 628	5
United States v. Good Springs Anchor Co. and Fidelity & Deposit Co.; not reported (D. C. S. D., Calif.)	5
United States v. Maryland Casualty Co., No. 399, October term, 1928	5
United States v. Onken Bros. Co., Inc., 23 F. (2d) 367	5
United States v. Philip J. Reynolds, decided Aug. 13, 1928; not reported (D. C. S. D., N. Y.)	5
Statutes:	
Revenue act of 1918, c. 18, 40 Stat. 1057, 1079, 1083—	
Sec. 234(a)(14)(a)	2
Sec. 250(d)	3
Revenue act of 1921, c. 136, sec. 250(d), 42 Stat. 227, 265	3
Revenue act of 1924, c. 234, secs. 277, 278, 43 Stat. 253, 269, 300	3
Revenue act of 1926, c. 27, sec. 1106(a), 44 Stat. 9, 113	4

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. ———

UNITED STATES OF AMERICA, PETITIONER

v.

THE JOHN BARTH COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in the above-entitled cause on the 7th day of June, 1928 (R. 29), affirming the judgment of the District Court for the Eastern District of Wisconsin. A petition for rehearing filed June 29, 1928, in the Circuit Court of Appeals, was entertained and was denied September 12, 1928 (R. 31), so that this petition is filed within the time prescribed by the Act of February 13, 1925, on which jurisdiction rests.

STATEMENT

The question presented in this case is whether an action on a bond given to stay the collection of a tax pending consideration of a claim in abatement is barred after expiration of the period of limitation prescribed by law on suits or proceedings for the collection of taxes.

On June 25, 1919, the Commissioner of Internal Revenue assessed income and profits taxes against the John Barth Company in the sum of $126,182.81, of which the John Barth Company paid $74,764.40. (R. 4.)

On September 15, 1919, and on March 17, 1925, the company filed claims for abatement. (R. 4.)

Section 234 (a) (14) (a) of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1079) provided in connection with such a claim for abatement that—

> • • • In such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with sureties satisfactory to the Commissioner, conditioned for the payment of any part of such tax found to be due, with interest. If any part of such claim is disallowed then the remainder of the tax due shall on notice and demand by the collector be paid by the taxpayer with interest at the rate of 1 per centum per month from the time the tax would have been due had no such claim been filed.

Pursuant to that statute and on September 20, 1919, the John Barth Company executed and delivered a bond, as principal, with the United States Fidelity & Guaranty Company as surety, conditioned for the payment of any part of such tax found by the Commissioner of Internal Revenue to be due upon determination of the claims in abatement. (R. 4, 6.)

On March 25, 1926, the Commissioner of Internal Revenue passed on the claims in abatement and determined there was due from said John Barth Company for such taxes the sum of $29,842.32 with interest, and notice thereof was given and demand for payment was made, which was refused. (R. 5.) Thereupon, and on September 22, 1926, the United States commenced this action against the principal and the surety on the bond to recover the taxes so determined to be due. (R. 2.)

If no claim for abatement and bond had been filed, and the suit had been one to recover the taxes, it would have been barred by the statute of limitations because commenced more than five years after the date the return was filed, because of the provisions of Section 250 (d) of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1083), Section 250 (d) of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 265), and Sections 277–278 of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 299, 300), which provided, generally, that no suit or proceeding for the collection of any taxes should be begun after the expiration of five

years from the filing of the return except in case of fraud.

On the institution of the suit these respondents demurred to the complaint on the ground that the action was not commenced within the time limited by law, and the demurrer was sustained. (R. 8–9.) From that decision the petitioner prosecuted error to the Circuit Court of Appeals for the Seventh Circuit. (R. 10.) The latter court, on November 4, 1927, certified to this Court two questions. (R. 20–22.) This Court declined to answer the questions on the ground that they went to the entire case, and dismissed the certificate, and remanded the case to the Circuit Court of Appeals, which affirmed the District Court. (R. 24, 25, 29.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the statutes limiting the time for the assessment of taxes and for commencing suits or proceedings for their collection applied to an action on a bond given to secure the payment of any part of an assessment of taxes found to be due after determination of a claim for the abatement thereof.

2. In holding that the liability of defendants on the bond was extinguished by Section 1106 (a), Revenue Act of 1926, which provides that the statute of limitations in respect of internal-revenue taxes shall not only bar the remedy but shall also extinguish the liability.

REASONS FOR GRANTING THE WRIT

(1) Substantially the same question as is presented in this case has been certified to this Court by the United States Circuit Court of Appeals for the Ninth Circuit in *United States* v. *Maryland Casualty Company*, No. 399, October Term, 1928, and it is desirable to save the rights of the United States in the present case pending the decision of the case so certified.

(2) While there is as yet no conflict of decision between the United States Circuit Courts of Appeals on this question, there is among the District Courts. The cases in the United States District Courts holding that the statute of limitations with respect to suits to collect taxes applies to suits on bonds given to secure payment of taxes pending the determination of claims in abatement are: *United States* v. *The Maryland Casualty Company* (unreported; District Court for the Northern District of California), *United States* v. *Good Springs Anchor Company and Fidelity & Deposit Company* (unreported; District Court for the Southern District of California). In the following District Court cases the contention of the United States has been sustained: *United States* v. *Onken Bros. Company, Inc.* (23 F. (2d) 367; Wyoming), *McCaughn, Collector*, v. *Philadelphia Barge Company* (27 F. (2d) 628; Eastern District of Pennsylvania), *United States* v. *Philip J. Rennolds* (decided August 13, 1928; District Court for the

Southern District of New York, not officially reported).

(3) There are a large number of similar cases pending.

Under the circumstances it does not seem necessary to submit a supporting brief and none will be filed.

WHEREFORE, it is respectfully submitted that this petition for certiorari should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

OCTOBER, 1928.